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No. 07-526

IN THE
Supreme Court of the United States

DONALD L. CARCIERI,
GOVERNOR OF RHODE ISLAND, *ET AL.*,
Petitioners,

v.

DIRK KEMPTHORNE,
SECRETARY OF THE INTERIOR, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. Since 1944, NCAI has advised tribal, federal, and state governments on a range of Indian issues, including the implementation of the Indian Reorganization Act of 1934 ("IRA") and the trust-acquisition authority principally at issue here. NCAI's members represent a cross-section of tribal governments. Great variations exist among them, including with respect to their lands, economic bases, populations, and histories. All of the Tribes, however, share a common interest in opposing the attack made here by petitioners (collectively, "the State") on the authority of the Secretary of the Interior to acquire land in trust for Indian Tribes. For the past 74 years, the trust authority has been critical for the Tribes in restoring a measure of economic self-sufficiency and political self-determination. The State's approach would threaten to halt, or even undo, much of that progress.

NCAI briefed the trust-acquisition issues before the First Circuit and presented oral argument both to the panel and to the en banc court. NCAI thus

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[1] The parties have consented to the filing of this brief. No party, counsel for a party, or person other than NCAI, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

has a strong interest in refuting the State's arguments here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State here mounts a frontal assault on the Secretary of the Interior's implementation of the Indian Reorganization Act of 1934, an act that sought to address the widespread problems of Indian poverty, lack of opportunity, loss of land base, and dislocation by providing Indian Tribes with clear avenues for self-government, land acquisition, natural-resource management, and improved employment and education.

Although one would not know it from the State's briefs, what is at issue here is the validity of a long-standing interpretation of the IRA, reflected in formal agency regulations issued after notice and comment, and due full deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Secretary's land-into-trust regulations — the ones at issue in this case — have been in place for more than a quarter century, and they extend the benefits of the IRA to all federally recognized Tribes — as do all of the other current regulations implementing the provisions of the IRA. Nor is this a recent conversion by the Secretary, as the Brief of the United States demonstrates. *See* US Br. 30-36 (recounting 74-year history of the Act).

The State contends, nevertheless, that these formal agency regulations and this administrative practice are unambiguously foreclosed by the "plain language" of the IRA. Under 25 U.S.C. § 479, the

IRA provides that the definition of an Indian "shall include," among others, "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." Focusing its attention on the single word "now" in that definition, the State contends that Congress unambiguously restricted IRA benefits to Tribes that were both recognized and under federal jurisdiction in 1934, regardless of their federal status today.

The consequences of accepting the State's construction of the IRA would be severe. Since 1934, the Secretary has recognized dozens of Tribes, all of which are eligible for the IRA under the Secretary's interpretation of the Act. Adopting the State's position would deprive many of these Tribes of access to the IRA's benefits, including the access to trust land that was a centerpiece of the IRA, and which today is critical to the efforts of Tribes both to achieve political self-determination and economic success and to protect their tribal culture and identity. Moreover, the State's position would open the door to years of litigation about the status of tribal land long thought to be settled.

If all of that were what Congress unambiguously required, then that congressional directive would control, the considered administrative practice and severe practical consequences notwithstanding. But Congress has not so required, and it did not do so by using the word "now."

At the outset, the State's focus on the word "now" is misguided. Indeed, even if everything the State says about the IRA were correct, the Secretary would *still* have the authority to take land in trust for the

Narragansett Indian Tribe. That is because Congress made Section 465 independently applicable to "all tribes" when it enacted the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, Title II, 96 Stat. 2517 (1983). Since the Narragansetts indisputably fall within the scope of ILCA, all of the State's sound and fury about the IRA is for naught.

But even if the IRA were the sole source of authority, the State's position would be untenable. As this Court has noted repeatedly, statutory construction is a "holistic endeavor," and the words of a statute often become clear when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quotation marks omitted). Here, considering both the entirety of this foundational Act and its place in the overall statutory framework governing modern Indian affairs, the IRA cannot be read as an unambiguous command to limit eligibility for IRA benefits to Indian Tribes that were recognized and under federal jurisdiction in 1934.

First, the IRA provides only that the definition of Indian "shall include" members of those Tribes now under federal jurisdiction. The statutory definition thus extends IRA eligibility to certain Indians, but it leaves ample room for the Secretary to conclude that other Indians — including members of all currently federally recognized Tribes — should come within the Act's broad scope.

Second, the word "now" is not the rigid straightjacket that the State contends. Either standing alone or in context, the word "now" can

reasonably be read to mean "at the time the statute is applied," as it does in numerous other statutes, and as the Secretary has read it to mean here. Moreover, the State's insistence that "now" refers to 1934 attributes to Congress the absurd intent that Tribes that were recognized in 1934 but later terminated would remain eligible for IRA benefits, and Tribes recognized today but not in 1934 would remain ineligible. Not only is that result preposterous on its face, it is directly contrary to what the legislative history reveals to be Congress's actual intent in adding the key language.

Third, the statutory definition of who qualifies as an individual "Indian" does not constrain the Secretary's authority under Section 465 to take land in trust for an "Indian tribe."

Finally, the State's view of "unambiguous" congressional intent cannot be squared with subsequent legislation. The IRA must be construed not in a vacuum, but instead as part of an effort by Congress to construct a statutory framework that reflects a coherent federal Indian policy. Against that backdrop, the State's argument again falls short: Statute after statute reflects an effort by Congress to preclude the arbitrary distinctions among groups of Tribes that the State seeks to create.

The State seeks to salvage its position by offering its own "policy" rationale, portraying the IRA as a narrow effort by Congress to overturn the specific policy of allotment. But that argument is meritless. As this Court has recognized repeatedly, the IRA embodied a broad federal effort to end a decades-long

policy of assimilation, a thorough and at times brutal approach, the impact of which still reverberates today. The State's misreading of history thus cannot save its misreading of the statute.

For all these reasons, the First Circuit en banc was correct to conclude — unanimously — that the Secretary of the Interior had ample authority for the trust acquisition here.

ARGUMENT

I. THE INDIAN LAND CONSOLIDATION ACT GIVES THE SECRETARY AUTHORITY UNDER SECTION 465 TO TAKE LAND IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE.

The State's challenge to the Secretary's exercise of his Section 465 authority focuses exclusively on the language of the IRA. As demonstrated by the brief of the United States, and as we show below, that challenge is meritless. It is also irrelevant. That is because the Indian Land Consolidation Act independently empowers the Secretary to use Section 465 to take land into trust for the Narragansett Indian Tribe.[2]

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[2] The argument that ILCA independently confers the requisite Section 465 trust authority was presented to the First Circuit panel and to the en banc court. *See, e.g.*, NCAI Opening Br. 16-17; NCAI En Banc Br. 15; U.S. Supp. En Banc Br. 12. The First Circuit did not reach that issue, having concluded that the Secretary had reasonably construed the IRA. *See Jones v. United States*, 527 U.S. 373, 398 (1999) (judgment may be defended on any ground properly raised below).

Congress enacted ILCA in 1983. Section 203 of ILCA provides:

> The provisions of section 465 of this title *shall apply to all tribes* notwithstanding the provisions of section 478 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

25 U.S.C. § 2202 (first emphasis added).[3]

The intended scope of ILCA was undeniably broad. The section-by-section analysis of the Act explains that ILCA "extends the provisions of Section [465] to all tribes," so that Section 465 "would automatically be applicable to any tribe, reservation or area excluded from such Act, including tribes that have previously voted to reject the 1934 Act pursuant to section [478]." H. Rep. No. 97-908, at 7 (1982), *reprinted in* 1983 U.S.C.C.A.N. 4415, 4416.

ILCA's definition of a "Tribe" reflects the intended breadth of the Secretary's trust authority and eliminates any argument that this authority is restricted by the date of a Tribe's federal recognition. "Tribe" is defined in ILCA as "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). This definition plainly

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[3] Section 478 allowed Tribes to opt out of the IRA. *See* 25 U.S.C. § 478 (exempting any Tribe that "voted against [the Act's] application" before June 18, 1936).

encompasses the Narragansetts.[4] Accordingly, ILCA independently grants authority under Section 465 for the Secretary to execute the challenged trust acquisition, and the First Circuit's construction of the Secretary's trust-acquisition authority therefore must be affirmed.[5] Any effort by the Court to go on to address the State's arguments concerning the original language of the IRA would constitute an impermissible advisory opinion.

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[4] The definition presents other issues that need not, and should not, be resolved here. ILCA's legislative history confirms that Congress intended the Secretary's trust authority to extend to *all* Tribes. The reading most consistent with that purpose, and with the grammatical rule of the last antecedent, *see Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), would be to apply the clause "for which, or for the members of which, the United States holds land in trust" only to the word "community." Any broader limitation — for example, reading ILCA to extend Section 465 only to Tribes that already have trust land — would be irrational, contrary to the broad text and plain purpose of § 2202, and inconsistent with the overall structure of ILCA, which applies to both trust and restricted fee lands. *See, e.g.*, 25 U.S.C. §§ 2203(a), 2204(a). But even if the statute were limited to Tribes that have trust land — an issue the Court need not and should not address — the Narragansetts would qualify, having transferred 1800 acres to the United States in trust nearly two decades ago in a decision that the State has never contested. Pet. App. 12; Carcieri Br. 9.

[5] As § 2202's proviso suggests, ILCA would not defeat any contention that the Rhode Island Indian Claims Settlement Act independently bars the trust acquisition here. For the reasons set forth in the briefs filed by the United States and by the Narragansetts, NCAI agrees that the Settlement Act does not independently bar the trust acquisition.

II. THE SECRETARY HAS STATUTORY AUTHORITY UNDER THE IRA TO TAKE LAND IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE.

Even setting aside ILCA, the IRA cannot be read to validate the State's position that eligibility for the benefits of the IRA is limited to Tribes that "were both federally recognized and under federal jurisdiction at the time of the IRA's enactment in 1934." Carcieri Br. 2; *see id.* at 13, 15. On that point, all the judges of the First Circuit agreed. Pet. App. 9 (majority opinion); *id.* at 72 n.25 (Howard, J., dissenting on other grounds); *id.* at 78 (Selya, J., dissenting on other grounds) (joining Howard's dissent "unreservedly").

The State challenges an agency construction of a statute that has been embodied in formal regulations for more than a quarter century. Indeed, the Secretary has promulgated regulations implementing all aspects of the IRA, and all of those regulations — including the land-into-trust regulations — extend the benefits of the IRA to all federally recognized Tribes. *See, e.g.*, 25 C.F.R. § 151.2(b), (c)(1) (implementing § 465); *id.* § 5.1(a) (implementing § 472); 42 C.F.R. § 136.41(a) (same for Indian Health Service); 25 C.F.R. § 163.1 (implementing § 466); *id.* § 81.1(b) (implementing, *inter alia*, §§ 476, 477). *See generally* US Br. 4, 30-31. And those formal regulations themselves arise out of a 74-year history of the Secretary's implementation of the Act. *See id.* at 31-36.

In making its challenge, the State faces a heavy burden. The Secretary's interpretation of the IRA is

reviewed under the familiar *Chevron* framework. Where, as here, the agency acts in formal regulations issued pursuant to delegated authority, the Court must uphold the Secretary's reasonable regulations under *Chevron* unless, after due consideration of the "text, structure, purpose, and history" of the statute as well as its "relationship to other federal statutes," the Court is convinced that Congress has unambiguously foreclosed the Secretary's interpretation. *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). Put another way, this Court must uphold the Secretary's reading of the statute if it is a permissible one, even if it is not the one this Court would adopt in the first instance. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron*, 467 U.S. at 843-44 & n.11.

Here, moreover, the State's burden is particularly heavy. *First*, the Secretary's interpretation arises in the context of Indian affairs, where the Executive Branch has always had substantial authority and discretion. The Executive Branch has independent constitutional authority over Indian affairs pursuant to both the treaty-making and war powers. U.S. Const. art. II, § 2, cls. 1-2; *see Morton v. Mancari*, 417 U.S. 535, 552 (1974); *see also Board of Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). And for most of our Nation's history, Congress has recognized the shared responsibility for Indian affairs by bestowing a broad grant of authority, permitting the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. § 9 (originally enacted in the Act of June 30, 1834, ch. 162, § 17, 4 Stat. 738); *see also id.* § 2 (giving Commissioner of

Indian Affairs "management of all Indian affairs and of all matters arising out of Indian relations") (originally enacted in the Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564). The view of the Executive Branch on its authority to deal with Indian Tribes thus merits special weight.

Second, the Court undertakes the *Chevron* analysis applying the canon that "[w]hen we are faced with … two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: [S]tatutes are to be construed liberally in favor of the Indians." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (internal quotation marks omitted); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). That canon is "rooted in the unique trust relationship between the United States and the Indians," *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985), a relationship directly implicated by the IRA here. Moreover, because that canon was well settled by the time Congress enacted the IRA, *see, e.g.*, *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89-90 (1918); *Choate v. Trapp*, 224 U.S. 665, 675 (1912), Congress should be presumed to have enacted the IRA well aware that any effort to limit the Act's broad remedial scope could be accomplished only by the clearest of terms.

The State cannot surmount these hurdles.

A. The IRA Leaves Ample Room for the Secretary's Reasonable Interpretation.

According to the State: (1) Section 479 provides an exhaustive definition of the term "Indian"; (2) the

word "now" in that definition requires the conclusion that the term "Indians" under the Act includes only members of Tribes that were "recognized" and "under Federal jurisdiction" in 1934; and (3) Section 465 permits the Secretary to take land in trust only "for Indians," and thus only for Tribes recognized and under federal jurisdiction in 1934. That argument fails at every level.

1. The Definition of "Indian" Is Not Exhaustive.

The State's argument hinges on Section 479's definition of "Indian." Although purporting to offer a plain-language reading of that definition, the State's briefs entirely ignore its opening text: "The term Indian as used in this Act *shall include* …." 25 U.S.C. § 479 (emphasis added). As that text makes clear, Section 479 does not purport to set forth an exhaustive list of what the term Indian "means," but only what the term "shall include." As this Court reiterated unanimously just months ago, "the word 'includes' is usually a term of enlargement, and not of limitation." *Burgess v. United States*, 128 S. Ct. 1572, 1578 n.3 (2008) (quotation marks omitted).

Nor was the Court in *Burgess* breaking new ground. Consistent with the plain meaning of "include," this Court has repeatedly acknowledged that the term is "inclusive rather than exclusive." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 312 n.9 (1978); *see, e.g.*, *United States v. New York Tel. Co.*, 434 U.S. 159, 169 (1977) (holding that rule defining property to "include" certain items "does not restrict or purport to exhaustively enumerate all the items which may be seized" under the rule); *Groman v. Comm'r*, 302 U.S. 82, 86 (1937) (term "include" is one

of "expansion" rather than "definition"); *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2188 (2008) ("include" indicates that "[t]he considerations set forth in [the rule] are nonexclusive"); *see also Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle") (citing cases).

The plain language, moreover, confirms that Congress intended the term "include" to be non-exhaustive. When Congress defined "tribe" later in Section 479, it used the words "shall be construed to refer to," rather than "shall include." 25 U.S.C. § 479. The juxtaposition between the illustrative approach to defining "Indian" and the exhaustive approach to defining "tribe" is stark, and presumed intentional. *See New York Tel.*, 434 U.S. at 371 n.15 ("[w]here the definition of a term in [the rule] was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"); *Burgess*, 128 S. Ct. at 1578 n.3 (same); *Groman*, 302 U.S. at 86 (same); *American Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933) (same, in case issued one year prior to IRA).

Thus, even if the State here were correct that "now" in Section 479 means "in 1934," that would be of no moment. The plain text makes clear that the three examples listed in the definition of "Indian" are not exclusive, and that the Secretary retains the authority to reasonably expand the definition, as he did here.

2. Congress Did Not Unambiguously Require "Now" to Mean "At the Time of Enactment."

Even setting aside the State's disregard of the term "shall include," the State's construction of the definition of an "Indian" fails because the word "now" does not unambiguously refer to the time of enactment.

a. There is no single dictionary meaning of "now." At the outset, the State's "dictionary" plain-language argument proves nothing. "Now" in a statute can be (as the State suggests) static, fixing the relevant point in time as the date of enactment. *See* Carcieri Br. 23-24 (citing examples). Or "now" can refer (as the Secretary has concluded) to the time the statute is applied. *See, e.g.*, *United States v. Reily*, 290 U.S. 33, 40-41 (1933) (holding that statute that eliminated alienation restrictions on land held by any Kickapoo Indian who was "now or hereafter" residing outside the United States did not apply to a Kickapoo who resided in Mexico at the time of enactment in 1906 but had returned to Oklahoma by 1929, when he inherited the land); Pet. App. 20 (citing examples); US Br. 18-19 (same); *see also* Comment to Unif. Child Custody Jurisdiction Act § 14(a)(1), 9 U.L.A. 580 (1999) (explaining that the term "now" in the phrase "does not now have jurisdiction" means "at the time of the petition," not when the legislature enacted the statute). And, of course, suggesting that "now" means "at the present time," *see* Carcieri Br. 19, proves nothing, since on the date of the Act's passage the "present time" was June 18, 1934, whether "now" means "time of

enactment" or "time of application." The dictionary alone simply cannot answer the question here.

The State relies heavily on the fact that "now" means "in 1934" in other parts of the statute. In Section 465, the Act describes legislation then before Congress as "now pending"; and in Section 472, the Act refers to positions maintained "now or hereafter." In each provision, the word "now" surely means "in 1934." According to the State, similar words must be given similar construction throughout the statute. *See* Carcieri Br. 21.

As this Court noted in *General Dynamics v. Cline*, however, the idea that a word has identical meaning throughout an Act is only a "presumption," and one that "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." 540 U.S. at 595; *see also id.* (citing cases); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). And where, as here, the term at issue is a "common" rather than a technical term that in "ordinary conversation" has multiple meanings that are easily understood, the State's presumption has particularly little force. *Cline*, 540 U.S. at 596.

Moreover, the State ignores the cardinal rule that statutory language "must be read in context [since] a phrase 'gathers meaning from the words around it.'" *Id.* (citation omitted; alteration in original). "Now" in Section 465 and in Section 472 must mean "in 1934" precisely because *other words* in the statute make that meaning clear. Thus, the meaning of "now" in

the phrase "measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927)," 25 U.S.C. § 465, or in "positions maintained, now or hereafter," *id.* § 472, is clear not because the word "now" has only a single meaning, but rather because the word "now" in those provisions is surrounded by other words that limit its scope. In Section 479, by contrast, the unadorned "now" lacks those surrounding words of limitation and thus leaves space for the Secretary's reasonable construction.

b. The Secretary's reading makes sense of the Act. There is, moreover, good reason to believe that the Secretary's construction is the far better one. For one thing, if Congress had wanted to limit the time of recognition to a date certain in 1934, it could have done so expressly. Indeed, the very next clause in Section 479 incorporates a specific date: June 1, 1934. The contrast between that date and the term "now," which appears earlier in the same sentence, must be presumed intentional.

In addition, if the State is correct about the meaning of the word "now," Congress could easily have written the second example in the definition of Indian to refer to "descendants of such members *now residing* within the present boundaries of any reservation," rather than "descendants of such members *who were, on June 1, 1934, residing* within the present boundaries of any reservation." That Congress saw the need to avoid the term "now" and specify the 1934 date suggests that Congress did not understand "now" to mean "in 1934."

Equally important, the State's approach leads to absurd results. For example, Section 461 provides

that "hereafter, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive Order, purchase, or otherwise, shall be allotted in severalty to any Indian." 25 U.S.C. § 461. That provision was written broadly to end the disastrous allotment policy. Under the State's reading, however, Section 461 leaves in place the allotment statutes for any Tribe recognized after 1934, so that, for example, a Tribe recognized and given a reservation by Congress in 1936 would still be subject to allotment, since the General Allotment Act of 1887 (Dawes Act) is still technically on the books. *See* 25 U.S.C. § 331; Felix S. Cohen, *Handbook of Federal Indian Law* 217 (1942) (noting that Section 461 "is incompatible with and, therefore, supplants all prior laws, both general and special, purporting to authorize allotments in severalty in any form on any reservation to which the act applies, and this notwithstanding the fact that the act contains no general repeal provision"). That cannot be what Congress intended.

Moreover, under the State's view that "now" freezes the IRA in 1934, a Tribe that was recognized in 1934 but that later had its recognition terminated — which happened in significant number during the Termination Era of the 1950s, *see* Robert T. Anderson, Bethany Berger, Philip P. Frickey & Sarah Krakoff, *American Indian Law: Cases and Commentary* 142 (1st ed. 2008) — remains eligible to receive lands in trust under Section 465 even though it has been terminated; termination does not change the fact that the Tribe was recognized and under federal jurisdiction in 1934. That a terminated Tribe would be eligible for benefits while a currently

recognized Tribe would not is an absurdity that Congress again could not have intended. *See United States v. Granderson*, 511 U.S. 39, 56 (1994) (interpreting statute to avoid absurd results).

c. The legislative history supports the Secretary's reading. Such a reading is particularly inapt because the legislative history demonstrates that the absurd result is precisely the *opposite* of what Congress intended. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in judgment) (calling it "entirely appropriate to consult all public materials, including the … legislative history of [the statute's] adoption" to assess whether Congress intended the absurd result attributed to it). The legislative history here is uniquely illuminating because it includes a transcript of the very colloquy in which the phrase "now under Federal jurisdiction" was added to the statute. Senate Committee Chairman Wheeler opined that certain Tribes that were under federal supervision should not be, and that they should eventually be excluded from the Act:

> [Y]ou have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Hearing on S. 2744 and S. 3645 Before the S. Comm. on Indian Affairs, 73d Cong. 266 (1934).

Senator O'Mahoney responded by noting that these Tribes, if later terminated, should be automatically excluded from the Act's coverage "by some separate provision." *Id.*

Commissioner of Indian Affairs Collier then proposed language to effectuate that goal:

> Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1, insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half blood would get help.

Id.

Thus, the legislative history strongly suggests that, far from freezing eligibility for IRA benefits in 1934, the very purpose of the term "now under Federal jurisdiction" was to preclude certain Indian Tribes — such as Chairman Wheeler's northern California Tribes — from laying claim to the Act's benefits once terminated. The State's result is not only absurd, but precisely the opposite of what Congress intended.[6]

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[6] Below, the State suggested that this absurdity was overstated because the statutes that terminated Indian Tribes after the IRA often provided expressly that termination ended all tribal benefits. But the Congress that enacted the IRA could not have known how future Congresses would draft termination legislation. It is unreasonable to posit that Congress in 1934

d. The State's reading is inconsistent with the nature of federal recognition. Finally, the State's interpretation of "now" should be rejected because the resulting regime would be inconsistent with the nature of federal recognition. "Federal recognition is just that: recognition of a previously existing status." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994). In other words, federal recognition by the Secretary of the Interior "acknowledges" a Tribe's continuous historical tribal existence. *See id.*[7]

Because recognition reflects a historical fact, the only reason that a Tribe would be recognized currently but not in 1934 is that the federal government — due to mistake, neglect, or lack of awareness — failed to acknowledge the Tribe's existence.[8] The State's approach would bind the

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drafted legislation that would permit absurd results in the hope that future Congresses would draft around the absurdity.

[7] The Secretary's regulations make that clear: among the "mandatory criteria" for federal acknowledgment is the requirement that the proposed Tribe "has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b); *see also id.* § 83.7(c), (e); Law Professors Br. 29-31.

[8] As the Law Professors Brief makes clear, *see id.* at 9-22, the concepts of being "recognized" and "under Federal jurisdiction" were more fluid in the 1930s than they are today. There was, for example, no "list" of federally recognized Tribes to which policymakers could turn, and it is even plausible to read the concepts of "recognized" Tribes and Tribes "under Federal jurisdiction" to refer broadly to groups of Indians who could constitutionally be subjected to the Indian affairs power under *United States v. Sandoval*, 231 U.S. 38 (1913), and *United States v. Candelaria*, 271 U.S. 432 (1926).

government to its earlier misdeeds or mistakes, to the detriment of the Tribe, without any reasonable justification. *See, e.g.*, *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 (D.D.C. 1980); *see also* General Accounting Office, Report No. GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process, Appendix I, at 24 (Nov. 2001) ("[T]he underlying position of the administration has always been that the executive branch can correct mistakes and oversights regarding which groups the federal government recognizes as Indian tribes ….").

This case illustrates the problem. The district court correctly noted that "there can be no serious dispute concerning the Narragansetts' tribal status in 1934." Pet. App. 113. "[T]he Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications," and have a "documented history dating from 1614." *Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983). As the State would have it, the government is bound by its failure to recognize this history, and the Tribe must suffer the consequences. Congress should not lightly be understood to have ordained such a capricious regime through a statute designed to help Tribes that had already suffered so greatly at the hands of prior federal policy.

3. Section 465 Provides the Secretary with Broad Authority to Take Land in Trust for an "Indian Tribe."

Even if the State could excise the words "shall include" from the statute and could fix the meaning

of "now" at the time of enactment, the State still would not prevail. Section 465 permits land to be taken into trust for an "Indian tribe or individual Indian," 25 U.S.C. § 465, and the Narragansetts are an "Indian tribe." Thus, the trust acquisition at issue here fits comfortably within the plain language of the Act.

The State argues to the contrary, asserting that the phrase "for the purpose of providing land for Indians" in Section 465 limits the Secretary to acquiring trust land only for Tribes recognized and under federal jurisdiction in 1934. *See* Carcieri Br. 17-18. That argument is doubly mistaken.

First, as the United States describes at length, neither the term "Indians" nor the term "Indian tribe" in Section 465 incorporates Section 479's definition of an individual Indian, and thus the Secretary's authority to take land in trust for a federally recognized Tribe remains undiminished. *See* US Br. 12-14.

Second, even if the State were correct that "Indians" as used in Section 465 incorporates the definition provided by Section 479, the quoted portion of Section 465 articulates at most the provision's purpose; as such, it is no limit on the scope of the provision's substantive reach. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801-02 (2008). In short, because Section 465 broadly permits land to be taken in trust for an "Indian tribe," the Secretary had ample authority for the trust acquisition here.

The word "now," in short, was never intended to eviscerate the Secretary's authority under the IRA.

Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

B. Subsequent Legislation Confirms the Secretary's Statutory Authority Here.

Congressional legislation over the past quarter century confirms the legitimacy of the Secretary's interpretation here.

As this Court has recently reaffirmed, statutory construction is a "holistic endeavor," and "[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'" *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). In determining the possible meanings of a statute, subsequent legislation is instructive, because "[o]ver time, … subsequent acts can shape or focus those meanings." *Brown & Williamson*, 529 U.S. at 143. Particularly in areas such as Indian law where Congress enacts a body of legislation designed to create a coherent federal solution to complex policy challenges, this Court cannot sensibly interpret a statute with a narrow focus on any particular word or provision. Instead, it must more broadly take on "[t]he 'classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination.'" *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)); *see also United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) ("[A] specific policy embodied in a later federal statute

should control our construction of the [earlier] statute, even though it has not been expressly amended."). Reconciling the IRA with the general body of federal Indian law leaves no doubt that the Secretary has acted properly here.

1. The State's Reading Is at Odds with the Body of Federal Indian Legislation.

The State's contention that the IRA bars the Secretary from acquiring land under Section 465 for Tribes recognized after 1934 — which includes all Tribes recognized by the federal administrative recognition process — is flatly inconsistent with federal statutes that embody Congress's view that the time and manner of federal recognition is irrelevant to the rights, privileges, and immunities a Tribe possesses.

In 1994, for example, Congress amended the IRA for the very purpose of eliminating the kinds of distinctions the State contends are mandatory here. Section 476(f) covers all regulations issued "pursuant to the Act of June 18, 1934 … or any other Act of Congress," and it prohibits any federal regulation that "classifies, enhances, or diminishes the privileges and immunities available to [a federally recognized] Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 476(f). Section 476(g) similarly invalidates existing federal regulations that create distinctions in the privileges and immunities available to federally recognized Tribes. *Id.* § 476(g). The principal intent of the amendments was to eliminate distinctions among federally recognized Tribes. *See, e.g.*, 140 Cong. Rec. 11235 (1994)

(statement of cosponsor Sen. Inouye) ("[E]ach federally recognized Indian tribe has the same governmental status as other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States."); *see also* US Br. 37 (quoting similar statement of cosponsor Sen. McCain). Indeed, had regulations reflecting the State's interpretation of Section 465 been in place in 1994, they would have been eliminated by Section 476(g), and Section 476(f) would have prevented their adoption later.

That same federal policy is reflected in numerous pieces of legislation that demonstrate Congress's intent to eliminate, not perpetuate, distinctions among Tribes. Thus, for example, the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §§ 479a & 479a-1, requires the Secretary to list all federally recognized Tribes without distinguishing among them by date or method of recognition. In the findings accompanying the List Act, Congress observed that Indian Tribes "may be recognized by Act of Congress; by the administrative recognition procedures set forth in [25 C.F.R. Part 83]; or by a decision of a United States court." Pub. L. No. 103-454, § 103(3), 108 Stat. 4791, 4791. Congress required that all Tribes be placed on a single list — regardless of the means of recognition — because the list "should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* § 103(8), 108 Stat. at 4792.

Moreover, Congress has repeatedly acted to extend the IRA's scope and to eliminate distinctions in eligibility for the IRA's critical provisions, confirming Congress's view that there is no place for distinctions such as the State seeks to have the Court draw here. As discussed above, *see supra* Part I, ILCA opens the land-into-trust benefits of Section 465 even to Tribes that rejected the IRA, and it does so using broad language. Similarly, in 1990, Congress enacted Section 478-1, which, "notwithstanding Section 478" — *see supra* n.3 (discussing Section 478) — extends Sections 462 and 477 to "all Indian tribes." 25 U.S.C. § 478-1; *see also* S. Rep. No. 101-226, at 10-11, *reprinted in* 1990 U.S.C.C.A.N. at 198 (noting that "[t]his amendment is consistent with the extension in 1983 of another provision of the 1934 Act relating to land acquisition to all tribes under Section 203 (25 U.S.C. § 2202) of the Indian Land Consolidation Act").

The Secretary has gotten the message. In regulation after regulation, the Secretary has defined the term "Indian" and "Indian tribe" to extend to all federally recognized Tribes. *See, e.g.*, 25 C.F.R. § 20.100 (defining "Indian tribe" for implementation of Indian financial assistance and social services programs); *id.* § 23.2 (same for Indian Child Welfare Act); *id.* § 36.3 (same for minimum standards for schools operated by the Bureau of Indian Affairs); *id.* § 39.2 (same for Indian School Equalization Program); *id.* § 162.101 (leasing and permitting tribal lands); *id.* § 166.4 (general grazing regulations); *id.* § 211.3 (leasing tribal lands for mining).

Against this backdrop of Congress's body of federal Indian law, it makes no sense to interpret Congress's grant of trust-acquisition authority as requiring the Secretary to maintain rigid lines between Tribes recognized in 1934 and Tribes recognized thereafter. When Congress has made plain its view that the Executive Branch should not draw broad and arbitrary distinctions among Tribes, this Court should not hold that such distinctions are nonetheless required.

2. Congress Has Enacted Legislation That Presumes the Secretary's Reading of the IRA Is Correct.

The State's position also conflicts with subsequent federal legislation that is premised on the Secretary's having authority to take land in trust for Tribes recognized by the Secretary after 1934. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.,* establishes a framework for conducting gaming operations on tribal lands. In the so-called "after-acquired lands" provision, Congress generally restricted gaming operations on "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," *id.* § 2719(a), but created an exception for lands taken into trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary *under the Federal acknowledgement process.*" *Id.* § 2719(b)(1)(B)(ii) (emphasis added).

In other words, Congress created an express exception in IGRA to address the very scenario that the State claims cannot exist: the Secretary's use of his land-into-trust authority to create a reservation

for a newly acknowledged Tribe — indeed, for a Tribe whose initial reservation was established after October 17, 1988, more than half a century after passage of the IRA. That Congress saw fit in IGRA to account for the Secretary's exercise of his trust authority for newly acknowledged Tribes is powerful evidence that the Secretary possesses such power in the first place. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 770 (1996) (interpreting earlier statute to convey disputed power to President when subsequent statute was premised on the President's having that power); *NationsBank of N.C., N.A., v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 (1995) (upholding agency's interpretation of National Bank Act as granting disputed authority to banks because "Congress' insertion of [a] limitation decades after the Act's initial adoption makes sense only if banks already *had* the [the challenged] authority" (emphasis in original)). *See generally Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).[9]

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[9] The fact that Congress has consistently refrained from overturning the Secretary's settled construction of the Act despite repeated amendments to the IRA is further evidence that the construction is permissible, especially since (as the IGRA discussion above demonstrates) Congress was aware of the Secretary's claim to the authority challenged here. *See Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986).

C. Nothing in the 1936 Department Circular Compels a Different Result.

As the United States has indicated, an internal Department of the Interior circular from 1936 treats the word "now" in Section 479's definition of "Indian" as referring to "1934." US Br. 34-36. The circular itself is focused principally on a different issue — the determination of "half-blood" status under Section 479 — and contains no analysis of the term "now," which is set forth only in passing in the introduction setting out the basic definition of an "Indian." That circular sheds no light on the issues before the Court.

At the outset, the circular is relevant *at most* to the meaning of the term "now." As set forth above, however, the meaning of "now" is beside the point: ILCA independently extends Section 465 to "all tribes," including the Narragansetts; Congress made clear that the definition of an "Indian," which "shall include" the examples listed in Section 479, is not exhaustive; and Section 465 permits the Secretary to take land in trust for any "Indian tribe," which includes a federally recognized Tribe such as the Narragansetts. Thus, the circular is of no moment for the dispositive questions here.

Moreover, even with respect to the word "now," the circular is of little weight because the Secretary has taken a contrary approach in formal regulations promulgated in notice-and-comment rulemaking. Even if the interpretation in the circular had been set forth in formal regulations, the Secretary would *still* be entitled to change positions, and the current regulations would govern. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996). An internal

memorandum plainly cannot override the Secretary's subsequent formal interpretation of the statute. *Id.* at 742-43. And that is all the more true when, as here, the internal memo (1) reflects no analysis of the meaning of "now"; (2) does not grant or deny benefits to any Indian or Tribe; (3) is at odds with the legislative history; and (4) conflicts with the slew of Solicitor's Opinions and regulations from the 1930s and 1940s that are consistent with the approach embodied in formal regulations today. US Br. 32.

D. The IRA Was Not Targeted Narrowly at the Victims of Allotment.

Faced with the implausible argument that its reading of the statute requires the Court to overturn considered agency regulations and settled expectations on the basis of a single word — "now" — the State invents a policy justification to make the implausible seem less so.

Portraying the IRA as principally a statute designed to end the allotment of Indian lands, the State contends that its construction of the IRA "makes eminent sense" because "only those tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment would have been subject to the allotment policy that the IRA was intended to remedy." Carcieri Br. 15.

But the State is simply mistaken. Tribes that had never been subject to allotment — such as the Mississippi Band of Choctaw Indians — were covered by the IRA, as this Court recognized in *United States v. John*, 437 U.S. 634, 649-50 (1978), and no one disputes that all half-blood Indians were covered,

whether or not those Indians had been subject to allotment.

Equally to the point, the State's view of the purpose of the IRA is intolerably narrow. The decades preceding the IRA were marked by a policy of assimilation, as policymakers sought to eradicate native religions, indigenous languages, and communal ownership of property to shift power from tribal leaders to government agents. *See* Francis Paul Prucha, *The Great Father* 609-916 (1984).[10]

The IRA was "sweeping" legislation that was part of the effort to undo this history by addressing issues of Indian poverty and lack of opportunity. The Act's "overriding purpose" was to "establish machinery whereby Indian Tribes would be able to assume a greater degree of self-government, both politically and economically." *Mancari*, 417 U.S. at 542.

Tribes were encouraged to "'revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973), which would in turn render them eligible for economic-development loans from a revolving credit fund, as well as other federal

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[10] The Narragansetts were themselves victims of assimilationist policies. Throughout the 1800s, the State of Rhode Island sought to "extinguish [the Narragansetts'] tribal identity." *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (D.C. Cir. 1998). The State's campaign culminated in 1880 when the Tribe "s[old] (for $5,000) all but two acres of its reservation." *Id.* (citing William G. McLoughlin, *Rhode Island* 221 (1978)).

assistance. *See* 25 U.S.C. §§ 469-470, 476-478; Felix S. Cohen, *Handbook of Federal Indian Law* § 1.05, at 86 (2005 ed.). And, of course, Congress addressed the loss of Indian lands, including the loss of lands through allotment. *See, e.g.*, 25 U.S.C. § 461 (prohibiting further allotment); *id.* § 462 (extending indefinitely restrictions on alienation); *id.* § 463 (restoring unsold "surplus" lands to tribal ownership); *id.* § 465 (providing land-in-trust authority). But Congress nowhere limited the land-acquisition provisions to the victims of allotment, and the provisions have always been applied more broadly, with the result that over the last 70 years, virtually all federally recognized Indian Tribes have had land taken into trust, much of it — thousands of parcels covering millions of acres — pursuant to Section 465.

In short, the attempt to limit the Act or its critical land-into-trust provision to the victims of allotment is spun from whole cloth, and it cannot save the State here.

III. THE INVALIDATION OF THE SECRETARY'S REGULATIONS WOULD BE DEVASTATING FOR NEWLY ACKNOWLEDGED TRIBES.

The State's casual disregard for the Secretary's formal regulations and its radical reinterpretation of the text and purpose of the IRA threaten severe consequences for Tribes recognized administratively since 1934. Since the Termination Era concluded in the early 1960s, some 30 Tribes have been recognized administratively. *See* Law Professors Br. 42-44. And many more received entitlement to the benefits of the IRA as a result of opinions issued by

the Solicitor of the Interior in the 1930s and 1940s. Many of those Tribes have had land taken in trust under Section 465, and many (if not all) have availed themselves of the other benefits of the IRA. Adopting the State's interpretation of the Act would wreak havoc on these Tribes.

First and foremost, the State's approach would eliminate the Tribes' ability to acquire trust land, because, for the vast majority of post-1934 Tribes (as for the vast majority of Indian Tribes generally), Section 465 provides the only means for acquiring additional trust land.[11] Today, many Tribes have pending before the Secretary land-into-trust applications that are critical to the Tribes' political, economic, and cultural revitalization, and years of planning have been spent in reliance on the Secretary's long-standing interpretation. The State's argument, if accepted, would halt this process of revitalization in its tracks.

Indeed, the importance of trust land to Indian Tribes cannot be overstated. Even today, while many Tribes have made notable advances, nationwide, Indian Tribes continue disproportionately to face conditions of poverty,

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[11] For a few Tribes, the Secretary has independent statutory authority, although even that authority is often limited. The Miccosukee Tribe (25 U.S.C. § 1747(a)), the Mohegan Tribe (*id.* § 1775c(a)), the Wampanoag Tribe (*id.* § 1771d), and the Death Valley Timbi Shoshone Tribe (Pub. L. No. 106-423), for example, all have statutory authorizations for the Secretary to take specific land in trust; other trust acquisitions require Section 465.

homelessness, crime, increased mortality rates, and lack of education. By nearly any measure, the standard of living for Indians is far below what most Americans enjoy. *See, e.g.*, Anderson, Berger, Frickey & Krakoff, *American Indian Law: Cases and Commentary*, *supra*, at 7-9.

Land provides an opportunity for Tribes to break this cycle of poverty and dependence. Taking land in trust can give Tribes economic independence, allowing for the formation of tribal businesses and employment of tribal members, while facilitating tribal economic development and allowing Tribes to develop their own independent tax base.

In addition, having trust land enables Tribes to exercise effective self-government. A land base is essential for Tribes to run schools and health clinics, build housing for their members (as the Narragansetts have sought to do since 1992 on the land at issue here), and provide court, law-enforcement, and an array of other critical government services.

More broadly, trust land enables Tribes to build a long-term homeland, protected from alienation or condemnation. As the drafters of the IRA understood, land is the engine for economic and political independence. *See generally* Cohen, *Handbook of Federal Indian Law* § 15.01, at 965 (2005 ed.) (describing importance of tribal lands). For many Tribes, the State's approach would stop that engine in its tracks.

In addition, the definition of an "Indian" in Section 479 triggers eligibility for an array of federally funded benefits and services, including

Indian schooling and preference in employment within the Bureau of Indian Affairs and the Indian Health Service. Members of Indian Tribes recognized after 1934 would be ineligible for many of these essential IRA programs.

The State's approach would, moreover, cast a cloud on past acquisitions and investments by the Tribes, ensuring litigation for decades for newly recognized Tribes. These Tribes can expect, for example, litigation over the status of previously acquired trust lands, which currently constitute reservations that are home to members of the Tribes and that house the businesses that have contributed to the Tribes' economic rebirth.

To be sure, the Tribes believe that the Indian-land exception in the Quiet Title Act, 28 U.S.C. § 2409a(a), prevents any challenge to land already taken into trust. *See id.*; U.S. Br. 4 n.1. The States and their allies, however, have not generally conceded that these challenges would be barred, and even the threat of such claims would likely trigger years of litigation and be tremendously destabilizing in the meantime.[12]

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[12] The Town of Charlestown denies the existence of any problem, making the preposterous assertion that "[s]ince the 1970s, with at most one or two exceptions, the Department has converted lands into trust for non-1934 Act tribes only pursuant to a separate settlement or other act of Congress." Charlestown Br. 34 n.12. NCAI addressed this assertion at length below, submitting deeds and other records to the court of appeals to demonstrate that the Secretary had regularly taken land in trust for Tribes not recognized and under federal jurisdiction in 1934. *See* NCAI Post-Argument En Banc Br. 5-12. Indeed, for

In short, the State's position would deny newly recognized Tribes access to trust land, cutting off their ability to create a homeland and eliminating their principal avenue for self-government and economic independence. To read that outcome as an unambiguous requirement of the IRA — a foundational statute designed broadly to address tribal dependence, landlessness, and poverty — is truly to go through the looking glass.

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be affirmed.

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several Tribes, the Secretary had taken land in trust despite express findings of federal courts or agencies that the Tribe was unrecognized throughout much of the twentieth century. *See id.*

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